

GOVERNMENT PROPOSED JURY INST. NO. 33Conspiracy -- Offense Charged

Count \_\_\_\_ of the indictment charges that from on or about the \_\_\_\_ day of \_\_\_\_, 19\_\_, until on or about the \_\_\_\_ day of \_\_\_\_, 19\_\_, in the \_\_\_\_ District of \_\_\_\_ [**and elsewhere**], the defendant[s], \_\_\_\_\_, came to some type of agreement or understanding to [**commit an offense against the United States namely, describe substantive offense or offenses**] [**defraud the United States**] <sup>1</sup> and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [**describe overt act or acts**].

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Devitt, Blackmar, and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.01

**NOTE**

<sup>1</sup> Substitute appropriate language if a *Klein* conspiracy is charged, e.g., to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes.

GOVERNMENT PROPOSED JURY INST. NO. 34

Statute Defining Offense

Section 371 of Title 18 of the United States Code provides, in part, that:

"If two or more persons conspire \* \* \* to commit any offense against the United States, or to defraud the United States, or any agency thereof \* \* \* and one or more of such persons do any act to effect the object of the conspiracy, \*  
\* \*"

an offense against the United States has been committed.

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18 U.S.C. § 371

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.02

GOVERNMENT PROPOSED JURY INST. NO. 35Essential Elements of Offense --  
When Conspiracy Offense Complete

In order to sustain its burden of proof for the crime of conspiracy to [**describe substantive offense(s)**] [**defraud the United States**] as charged in Count \_\_\_\_\_ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

**One:** The conspiracy, agreement, or understanding to [**describe substantive offense(s)**] [**defraud the United States**] 1, as described in the indictment, was formed, reached, or entered into by two or more persons;

**Two:** At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and

**Three:** At some time during the existence or life of the conspiracy, agreement, or understanding, defendant \_\_\_\_\_ knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement, or understanding.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.03

**United States v. Falcone**, 311 U.S. 205, 210 (1940)

**United States v. O'Campo**, 973 F.2d 1015, 1021 (1st Cir. 1992)

**United States v. Wiley**, 846 F.2d 150, 153-54 (2d Cir. 1988)

**United States v. Rankin**, 870 F.2d 109, 113 (3d Cir.), cert. denied, 493 U.S. 840 (1989)

**United States v. Tedder**, 801 F.2d 1437, 1446 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987)

**United States v. Yamin**, 868 F.2d 130, 133 (5th Cir.), cert. denied, 492 U.S. 924 (1989)

**United States v. Bostic**, 480 F.2d 965, 968 (6th Cir. 1973)

*United States v. Mealy*, 851 F.2d 890, 896 (7th Cir. 1988)

*United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 F.2d 1006 (1988)

*United States v. Penagos*, 823 F.2d 346, 348 (9th Cir. 1987)

*United States v. Gonzalez*, 797 F.2d 915, 916 (10th Cir. 1986)

*United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986)

*United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)

**NOTE**

1 Prosecutors charging *Klein* conspiracies in the Ninth Circuit should be aware of *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993).

GOVERNMENT PROPOSED JURY INST. NO. 37Conspiracy -- Existence of an Agreement

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

*[To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods set out in the indictment.]*

The government must prove that the defendant \_\_\_\_\_ and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would [**violate some law(s)**] [**defraud the United States**] by means of some common plan or course of action as alleged in Count \_\_\_\_\_ of the indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit the defendant \_\_\_\_\_.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.04

**United States v. Falcone**, 311 U.S. 205, 210 (1940)

**United States v. Labat**, 905 F.2d 18, 21 (2d Cir. 1990)

**United States v. DePew**, 932 F.2d 324, 328 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991)

**United States v. Nicoll**, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982)

**United States v. Hopkins**, 916 F.2d 207, 212 (5th Cir. 1990)

**United States v. Pearce**, 912 F.2d 159, 161 (6th Cir. 1990), *cert. denied*, 498 U.S. 1093 (1991)

**United States v. Schultz**, 855 F.2d 1217, 1221 (6th Cir. 1988)

**United States v. McNeese**, 901 F.2d 585, 599 (7th Cir. 1990)

**United States v. Kibby**, 848 F.2d 920, 922 (8th Cir. 1988)

**United States v. Powell**, 853 F.2d 601, 604 (8th Cir. 1988)

**United States v. Boone**, 951 F.2d 1526, 1543 (9th Cir. 1992)

**United States v. Gonzalez**, 940 F.2d 1413, 1417 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 910 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 39Must be More Than One Conspirator

The indictment charges a conspiracy among the defendants A and B and others, some of whom are named in the indictment as co-conspirators and some who are not so named because the indictment says that the grand jurors do not know who they are. A person cannot conspire with himself and therefore you cannot find either of the defendants guilty unless you find beyond reasonable doubt that he participated in a conspiracy as charged with at least one other person, whether a defendant or not, and whether named in the indictment or not. With this qualification you may find both of the defendants guilty or one of the defendants guilty and one not guilty or both not guilty, all in accordance with these instructions and the facts you find.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.12

*Morrison v. California*, 291 U.S. 82, 92 (1934)

*Rodgers v. United States*, 340 U.S. 367, 375 (1951)

*United States v. Giry*, 818 F.2d 120, 125 (1st Cir.), cert. denied, 484 U.S. 855 (1987)

*United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980)

*United States v. Allen*, 613 F.2d 1248, 1253 (3d Cir. 1980)

*United States v. Anderson*, 611 F.2d 504, 511 (4th Cir. 1979)

*United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), cert. denied, 387 U.S. 907 (1967)

*United States v. Lewis*, 902 F.2d 1176, 1181 (5th Cir. 1990)

*Sears v. United States*, 343 F.2d 139, 141-42 (5th Cir. 1965)

*United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991)

*United States v. Galvan*, 961 F.2d 738, 742 (8th Cir. 1992)

GOVERNMENT PROPOSED JURY INST. NO. 40Conspiracy -- Membership in an Agreement

Before the jury may find that defendant \_\_\_\_\_, or any other person, became a member of the conspiracy charged in Count \_\_\_\_ of the indictment, the evidence in the case must show beyond a reasonable doubt that the defendant \_\_\_\_\_ knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

*[If the evidence establishes beyond a reasonable doubt that the defendant \_\_\_\_\_ knowingly and deliberately entered into an agreement to [describe substantive offense] [defraud the United States], the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.]*

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.05

**United States v. Flaherty**, 668 F.2d 566, 580 (1st Cir. 1981)

**United States v. Southland**, 760 F.2d 1366, 1369 (2d Cir.), cert. denied, 474 U.S. 825 (1985)

**United States v. Rankin**, 870 F.2d 109, 113 (3d Cir.), cert. denied, 493 U.S. 840 (1989)

**United States v. Norris**, 749 F.2d 1116, 1121 (4th Cir. 1984), cert. denied, 471 U.S. 1065 (1985)

**United States v. Yanin**, 868 F.2d 130, 133 (5th Cir.), cert. denied,



492 U.S. 924 (1989)

*United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986)

*United States v. Warner*, 690 F.2d 545, 550 (6th Cir. 1982)

*United States v. Brown*, 934 F.2d 886, 889 (7th Cir. 1991)

*United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987)

*United States v. Esparza*, 876 F.2d 1390, 1392 (9th Cir. 1989)

*United States v. Medina*, 940 F.2d 1247, 1250 (9th Cir. 1991)

*United States v. Horn*, 946 F.2d 738, 740 (10th Cir. 1991)

*United States v. Lynch*, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992)

*United States v. Andrews*, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992)

*United States v. Dale*, 991 F.2d 819, 851 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286 (1993)

GOVERNMENT PROPOSED JURY INST. NO. 42

"Overt Act" -- Defined  
Success of Conspiracy Immaterial

In order to sustain its burden of proof on Count \_\_\_\_\_ of the indictment, the government must prove beyond a reasonable doubt that one of the members to the agreement knowingly performed at least one overt act and that this overt act was performed during the existence of the life of the conspiracy and was done to somehow further the goal(s) of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

The government is not required to prove that the parties to or members of the agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Sections 28.07, 28.08

**United States v. Yates**, 354 U.S. 298, 334 (1957)

**United States v. Arboleda**, 929 F.2d 858, 865 (1st Cir. 1991)

**United States v. Anderson**, 611 F.2d 504, 510 (4th Cir. 1979)

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*United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

*United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988)

*United States v. Zielie*, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 44

Conspiracy  
(Regular Charge)

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case, the defendant is charged with conspiring to \_\_\_\_\_ [***describe the object of conspiracy as alleged in the indictment***].

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

**First:** That two or more persons made an agreement to commit the crime of \_\_\_\_\_ [***describe***] as charged in the indictment;

**Second:** That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose;

**Third:** That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

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18 U.S.C. § 371

***Pattern Jury Instructions, Criminal Cases***, Fifth Circuit (1990 Ed.)  
Title 18 Offenses, Instruction No. 2.21, p. 89

***United States v. Hopkins***, 916 F.2d 207, 212 (5th Cir. 1990)

***United States v. Lewis***, 902 F.2d 1176, 1181 (5th Cir. 1990)

***United States v. Yamin***, 868 F.2d 130, 133 (5th Cir.), *cert. denied*,  
492 U.S. 924 (1989)

***United States v. Holcomb***, 797 F.2d 1320, 1327 (5th Cir. 1986)

***United States v. Nicoll***, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*,  
457 U.S. 1118 (1982)

***United States v. Diecidue***, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*,  
445 F.2d 946 (1980)

***Sears v. United States***, 343 F.2d 139, 141-42 (5th Cir. 1965)

GOVERNMENT PROPOSED JURY INST. NO. 46Conspiracy

In order to establish the offense of conspiracy, the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

A conspiracy is not proved unless the evidence establishes that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished.

The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant.

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18 U.S.C. § 371

*United States v. Brown*, 934 F.2d 886, 889 (7th Cir. 1991)

*United States v. McNeese*, 901 F.2d 585, 599 (7th Cir. 1990)

*United States v. Mealy*, 851 F.2d 890, 896 (7th Cir. 1988)

*United States v. Noble*, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 48Conspiracy

The defendant is charged in [**Count** \_\_\_\_\_ **of**] the indictment with conspiring to \_\_\_\_\_ in violation of Section \_\_\_\_\_ of Title \_\_\_\_\_ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

**First**, [**beginning on or about** \_\_\_\_\_ **and ending on or about** \_\_\_\_\_] [**starting sometime before** \_\_\_\_\_] there was an agreement between two or more persons to commit at least one crime as charged in the indictment **1**;

**Second**, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

**Third**, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership -- an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully



participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

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***Manual of Model Jury Instructions for the Ninth Circuit*** (1992 Ed.),  
Section 8.05A

***United States v. Caldwell***, 989 F.2d 1056, 1060 (9th Cir. 1993)

***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1992)

***United States v. Esparza***, 876 F.2d 1390, 1392 (9th Cir. 1989)

***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir. 1987)

#### NOTE

1 Prosecutors charging ***Klein*** conspiracies in the Ninth Circuit should be aware of ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993). The first element of the jury instruction should read:

***First, [beginning on or about \_\_\_\_\_ and ending on or about \_\_\_\_\_] [starting sometime before \_\_\_\_\_] there was an agreement between two or more persons***

to defraud the United States by cheating the government out of money, [**such as income tax payments, or property**] and also an agreement to defraud the United States that involved the impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. **Caldwell**, 989 F.2d at 1060.

GOVERNMENT PROPOSED JURY INST. NO. 51General Conspiracy Charge

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is **not** necessary for the government to prove that all of the people named in the indictment were members of the scheme; **or** that those who **were** members had entered into any formal type of agreement; **or** that the members had planned together **all** of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case **must** show beyond a reasonable doubt is:

**First:** That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

**Second:** That the defendant willfully became a member of such conspiracy;

**Third:** That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

**Fourth:** That such "overt act" was knowingly committed at or

about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.1, p. 70

***United States v. Andrews***, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992)

***United States v. Gonzalez***, 940 F.2d 1413, 1417 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 910 (1992)

***United States v. Lynch***, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992)

***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986)

***United States v. Zielie***, 734 F.2d 1447, 1456 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 53Conspiracy -- Offense Charged

Count \_\_\_\_\_ of the indictment charges that from on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, until on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_ [*the date of this indictment*], in the \_\_\_\_\_ District of \_\_\_\_\_ [*and elsewhere*], the defendants, [*insert name of first defendant*], [*insert name of second defendant*], [*insert names of other defendants*], came to some type of agreement or understanding to [*commit an offense against the United States, namely, (insert name of substantive offense or offenses)*] [*defraud the United States for the purpose of impairing, impeding, obstructing, or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income (or other relevant, e.g., excise) taxes*] and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [*describe overt act or acts*]. <sup>1</sup>

In violation of Title 18, United States Code, Section 371. Count II charges that . . .

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Devitt & Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 28.01 (modified)

**NOTE**

<sup>1</sup> The law is clear that overt acts in furtherance of a conspiracy need not be illegal in themselves. *Yates v. United States*, 354 U.S. 298, 334 (1957); *Braverman v. United States*, 317 U.S. 49, 53-54 (1942); *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

However, in the case of a *Klein* conspiracy (e.g., "to defraud the United States for the purpose of impairing, impeding, obstructing or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income), while the indictment need not use any specific words, it must allege the means by which the defendants intended to accomplish the conspiracy, and those means must involve "deceit, craft, trickery, or at least \* \* \* means that are dishonest." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

GOVERNMENT PROPOSED JURY INST. NO. 54

Multiple Objects  
(For Use With General Conspiracy Charge)  
18 U.S.C. § 371

In this instance, with regard to the alleged conspiracy, the indictment charges that the defendants conspired [*insert objects of conspiracy -- e.g., to file false income tax returns and to evade income taxes*]. <sup>1</sup> It is charged, in other words, that they conspired to commit two separate, substantive crimes or offenses.

In such a case it is not necessary for the government to prove that the defendant under consideration willfully conspired to commit *both* of those substantive offenses. It would be sufficient if the government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the two offenses the defendant conspired to commit. If you cannot agree in that manner, you must find the defendant not guilty.

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*Pattern Jury Instructions, Criminal Cases*, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.2, p. 73 (modified)

**NOTE**

<sup>1</sup> If one of the objects of the conspiracy is to defraud the United States by impeding, impairing, and obstructing the Internal Revenue Service in its ascertainment, assessment, and collection of taxes, the better practice would be that the remainder of the instruction not talk of "offenses." Instead, the word "object" should be used. For example, "[i]t is charged, in other words, that they conspired to achieve two separate objects."

GOVERNMENT PROPOSED JURY INST. NO. 55Overt Act During Period of Conspiracy

The government must also establish beyond reasonable doubt that at least one of the overt acts as alleged in the indictment <sup>1</sup> occurred while the conspiracy was still in existence.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.09

*United States v. Arboleda*, 929 F.2d 858, 865 (1st Cir. 1991)

*United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

*United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980)

*United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979)

*United States v. Yates*, 354 U.S. 298, 334 (1957)

**NOTE**

<sup>1</sup> Convictions have been sustained in cases where the government failed to prove the overt act alleged in the indictment, but proved an overt act that was not alleged. *United States v. Fassoulis*, 445 F.2d 13, 19 (2d Cir.), cert. denied, 404 U.S. 858 (1971); *United States v. Armone*, 363 F.2d 385 (2d Cir. 1966), cert. denied, 385 U.S. 957 (1966); *United States v. Negro*, 164 F.2d 168, 173 (2d Cir. 1947).

**COMMENT**

<sup>1</sup> This instruction may not be necessary in a case in which the evidence shows that the conspiracy, if it existed at all, continued during the entire period indicated by the alleged overt acts. It should be given, however, if there is an issue of termination. See Devitt and Blackmar, *Federal Jury Practice and Instructions*, (3d Ed. 1977), Sec. 27.09, NOTES, p. 30:

GOVERNMENT PROPOSED JURY INST. NO. 56Withdrawal of Alleged Overt Act Not Shown by Evidence

As you were advised following the close of the prosecution's case-in-chief, since no evidence was offered in support of the alleged overt act designated in the indictment as \_\_\_\_\_, that overt act has been withdrawn from your consideration, and must be entirely disregarded, in arriving at your verdict as to the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment.

However, the evidence in the case as to the remaining overt acts alleged in the indictment, and designated as \_\_\_\_\_, is to be considered in your determination of the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment. The government does not have to establish performance of all of the remaining overt acts as set out in the indictment. Proof beyond a reasonable doubt of one such act is sufficient.

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Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 27.02

***United States v. Anderson***, 611 F.2d 504, 510 (4th Cir. 1979)

***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

***United States v. Zielie***, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)



GOVERNMENT PROPOSED JURY INST. NO. 57Single or Multiple Conspiracies

Count \_\_\_\_\_ of the indictment charges that defendant \_\_\_\_\_ knowingly and deliberately entered into a conspiracy to [**describe substantive offense(s)**] [**defraud the United States**].

In order to sustain its burden of proof for this charge, the government must show that the single [**overall**] [**umbrella**] [**master**] conspiracy alleged in Count \_\_\_\_\_ of the indictment existed. Proof of separate or independent conspiracies is not sufficient.

In determining whether or not any single conspiracy has been shown by the evidence in the case you must decide whether common, master, or overall goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goal(s) or objective(s) shown.

A single conspiracy may involve various people at differing levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, however, the government need not prove that an alleged co-conspirator knew each of the other alleged members of the conspiracy nor need it establish that an alleged co-conspirator was aware of each of the transactions alleged in the indictment.

Even if the evidence in the case shows that defendant \_\_\_\_\_ was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must acquit defendant \_\_\_\_\_.

Unless the government proves the existence of the single [**overall**] [**umbrella**] [**master**] conspiracy described in the

indictment beyond a reasonable doubt, you must acquit defendant \_\_\_\_  
\_\_\_\_\_.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.09

**Blumenthal v. United States**, 332 U.S. 539, 557 (1947)

**United States v. Diecidue**, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 F.2d 946 (1980)

**United States v. Noble**, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985)

**United States v. Massa**, 740 F.2d 629, 636 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985)

**United States v. Horn**, 946 F.2d 738, 740 (10th Cir. 1991)

GOVERNMENT PROPOSED JURY INST. NO. 59Multiple Conspiracies

You must determine whether the conspiracy charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

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***Pattern Jury Instructions, Criminal Cases***, Fifth Circuit (1990 Ed.), Title 18 Offenses, Instruction No. 2.22, p. 92

GOVERNMENT PROPOSED JURY INST. NO. 60Multiple Conspiracies

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

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***Manual of Model Jury Instructions for the Ninth Circuit*** (1992 Ed.),  
Section 8.05B

GOVERNMENT PROPOSED JURY INST. NO. 61

Multiple Conspiracies  
(For Use With General Conspiracy Charge)

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, not the one charged in the indictment, then you must acquit that defendant.

In other words, to find a defendant guilty you must unanimously find that he was a member of the conspiracy charged in the indictment and not a member of some other separate conspiracy.

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.3, p. 74

***COMMENT***

1 ***United States v. Diecidue***, 603 F.2d 535, 548-549 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), approved this instruction.

GOVERNMENT PROPOSED JURY INST. NO. 62Conspiracy -- Withdrawal

A person is not responsible for the conduct of another, if, before the commission of a crime, he [she] terminates his [her] effort to promote or facilitate the commission of the crime by: [*wholly depriving his prior efforts of effectiveness in the commission of the crime*]; or [*giving timely warning to the proper law enforcement authorities*]; or [*doing an affirmative act inconsistent with the object of the conspiracy where such act is communicated in a manner reasonably calculated to reach co-conspirators*] or [*making proper effort to prevent the commission of the crime*].

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*Federal Criminal Jury Instructions of the Seventh Circuit* (1980 Ed.), Section 5.12

*United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981)

GOVERNMENT PROPOSED JURY INST. NO. 63Conspiracy (Withdrawal -- Statute of Limitations)

One of the issues in this case is whether [**defendant's name**] withdrew from the conspiracy.

In order to withdraw, [**defendant's name**] must have taken some affirmative act to terminate his effort to promote or facilitate the conspiracy by [**wholly depriving his prior efforts of effectiveness in the commission of the crime, giving timely warning to the proper law enforcement authorities, doing an affirmative act inconsistent with the object of the conspiracy where the act is communicated in a manner reasonably calculated to reach co-conspirators, making proper effort to prevent the commission of the crime**].

[**Defendant's name**] cannot be found guilty of the conspiracy charge if he [she] withdrew from the conspiracy more than five years <sup>1</sup> before the indictment was returned. The indictment in this case was returned on [**date**]. Thus, the government must prove beyond a reasonable doubt that [**defendant's name**] did not withdraw from the conspiracy prior to [**date**].

[**NOTES: Choose appropriate term contained in brackets**].

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**Federal Criminal Jury Instructions of the Seventh Circuit**, Vol II (1983 Ed.), Instruction No. 5.13, p. 3

**United States v. Read**, 658 F.2d 1225, 1233 (7th Cir. 1981)

**NOTE**

<sup>1</sup> The statute of limitations is six years in a conspiracy to evade income taxes and in a *Klein* conspiracy. See Section 23.12, STATUTE OF LIMITATIONS, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 64Withdrawal From Conspiracy

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act -- on which you all agreed -- was committed by some member of the conspiracy.

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***Manual of Model Jury Instructions for the Ninth Circuit*** (1992 Ed.),  
Section 8.05D

***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980)



GOVERNMENT PROPOSED JURY INST. NO. 65

Withdrawal From Conspiracy  
(Use With General Conspiracy Charge)

As you have been instructed, a conspiracy, like the one charged in this case, does not become a crime until two things have occurred: first, the making of the agreement; and, second, the performance of some "overt act" by one of the conspirators.

So, if a defendant enters into a conspiracy agreement but later changes his mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

However, in order for you to decide that a defendant withdrew from a conspiracy you must find that the defendant took affirmative action to disavow or defeat the purpose of the conspiracy; and, as just explained, he must have taken such action before he or any other member of the scheme had committed any "overt act."

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.4, p. 75

***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987)